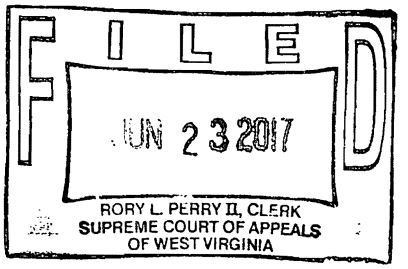

SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRI L. SMITH and KENNETH W. SMITH, Plaintiffs Below, Petitioners,	:	
	:	Case No. 17-0206
v.	:	(Ohio County Civil Action No. 13-C-323)
ROBERT TODD GEBHARDT, MICHAEL COYNE, and TRIPLE S&D, INC., Defendants Below, Respondents.	:	

PETITIONERS TERRI L. SMITH'S AND KENNETH W. SMITH'S

APPEAL BRIEF

Ronald Wm Kasserman (WVSB #1958)
Kasserman Law Offices, PLLC
94 - 14th Street
Wheeling, WV 26003
Telephone: (304) 218-2100
Fax: (304) 218-2102
ron@kassermanlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ASSIGNMENTS OF ERROR

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENT GEBHARDT'S MOTION TO DISMISS AS A SANCTION FOR SERIOUS LITIGATION MISCONDUCT AND SPOLIATION OF EVIDENCE BY PETITIONERS AND PETITIONERS' COUNSEL AND DISMISSING THE CASE AGAINST NOT ONLY RESPONDENT GEBHARDT, BUT ALSO RESPONDENTS MICHAEL COYNE AND TRIPLE S&D, INC., WHO TOOK NO POSITION ON THE MOTION TO DISMISS

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On September 27, 2013, Petitioners' filed their Complaint regarding the construction of their home against general contractor, Respondent Robert Todd Gebhardt, supplier Lumber Liquidators, LLC and unknowns identified as "John Doe and John Doe Contracting." The Complaint was amended twice and Respondents, Michael Coyne and Triple S& D, Inc., who laid the bricks for the home, took the places of John Doe and John Doe Contracting. Appendix Vol 1, pg 43,129 398, 496.

On September 21, 2015, Respondent, Robert Todd Gebhardt, filed 47 motions relevant to this appeal consisting of 5 Motions in Limine and Motion for Sanctions regarding Petitioners experts, a Motion in Limine on 1 expert, a Motion to Strike 1 expert, an Omnibus Motion in Limine with 34 sub-parts, 5 Motions for Summary Judgment on theories of liability and a Motion to Dismiss based on spoliation. Appendix Vol 1, pg 722-1046.

On September 21, 2015, Respondents, Michael Coyne and Triple S&D, Inc. , filed 12 Motions with the Trial Court, relevant to this appeal joining in nine (9) of Respondent Gebhardt's motions and 2 separate Motions in Limine. Appendix Vol 1, pg 597-633.

On October 16, 2015, a Pre-Trial Conference was had and arguments made on the various motions. On Wednesday, October 28, 2015, the Trial Court emailed a postponement of the trial set for Monday, November 2, 2015, due to the "volume of pre-trial motions, responses, exhibits and expert testimony for the Court to address..."

Over the next year the Trial Court entered various pretrial Orders on the Motions filed, none of which mentioned any serious litigation misconduct or sanctions other than limiting expert testimony, excluding some evidence and considering adverse inference jury instruction. Appendix Vol 1, pg 54-124.

On November 4, 2016, a second Pre-Trial Conference was had. Appendix 2, pg 2235.

On November 8, 2016, Respondent Robert Todd Gebhardt was served with a trial subpoena issued by Petitioners' counsel by a professional process server, John Dan Livingston of J. D.'s Paper Service, requesting that Mr. Gebhardt bring"receipts for gravel applied to the basement floor...before the concrete was poured" for the 1st day of trial set for November 14, 2016. Appendix Vol 1, pg 1925.

On November 9, 2016, Respondent Robert Todd Gebhardt's counsel served the parties and the Trial Court with a Motion to Dismiss alleging litigation misconduct including misconduct related to the trial subpoena of Respondent Gebhardt as "harassment and intimidation of a key party-defendant" and "witness tampering." Appendix Vol 1, pg 1864.

On November 10, 2016, the Trial Court emailed all counsel indicating it took the allegations in the Motion to Dismiss "very seriously", that the trial for Monday, November 14, 2016, was postponed and that an evidentiary hearing would be had on Tuesday, November 15, 2016.

At the evidentiary hearing Petitioners, Terri Smith and Kenneth Smith, and Respondent Robert Todd Gebhardt testified. Respondent Gebhardt denied being harassed, intimidated or threatened by Mr. Livingston who served the trial subpoena on him. Appendix Vol 2, pg 2411, lines 5-23. Respondents, Michael Coyne and Triple S&D, Inc., by counsel, declared that they "did not take any position on the Motion" to Dismiss. Appendix Vol 1, pg 2322, lines 10-11.

On February 3, 2017, the Trial Court granted Respondent Gebhardt's Motion to Dismiss,

dismissed the case against Respondent Gebhardt and also dismissed the case against Respondents, Michael Coyne and Triple S&D, Inc. Appendix Vol 1, pg 1-27.

On March 3, 2017, Petitioners timely filed their Notice of Appeal. Appendix Vol 2, pg1969.

II. STATEMENT OF FACTS

Petitioners contracted with Respondent Robert Todd Gebhardt (hereinafter "Respondent Gebhardt"), on July 13, 2009, to build a home for them in Ohio County, West Virginia for $201,400.00. Appendix Vol 1, pg149-152. The home was a single story design on a cement block foundation with a concrete basement floor, plus an attached two (2) car garage without any basement. Petitioners contracted with Respondent Gebhardt to finish 546 square feet of the concrete block basement with dry wall and ceiling for a recreation room, hallway and ½ bath powder room for an additional $21,700.00, leaving 2 small rooms with unfinished concrete block walls. Appendix Vol 1, pg 153. With "add ins" Petitioners paid Respondent Gebhardt a total of $226,102.23. Appendix Vol 1, pg 130, 175.

Petitioners provided brick to be utilized on the exterior of the home for an average 3 feet high brick veneer wall around bottom of the walls. Vinyl siding was applied to the remaining part of the walls extending up to the roof. Appendix Vol 3, pg 3168, Gebhardt depo. lines10-11. There are photographs of house showing brick and siding. Appendix Vol 5, pg 5317-5329.

Less than four (4) months after Petitioners moved into their home Petitioner Terri Smith gave Respondent Gebhardt a list of questions and concerns dated January 22, 2010, which started with the question, "Why is the block in basement back room wet."Appendix Vol 1, pg 296.

Respondent Gebhardt knew of and tried to fix it the water infiltration for 3 years after the initial construction and before the litigation was filed by:

1. Separating the French drain system from the gutter/down spout system; Appendix Vol 3, pg 3238, Gebhardt depo, line 18 to pg. 3239, line 12;

2. Waterproofing the brick veneer 3 times in 3 years before the litigation was filed; Appendix Vol 3, pg 3116, Gebhardt depo. line 12 to pg. 3117, line 5.
3. Had basement carpeting relaid after it had been taken up to dry after water intrusion soaked it; Appendix Vol 3, pg 3130,Gebhardt depo. line 24 to pg. 3131, line 3
4. Digging to uncover the Tuff-N-Dry foundation waterproofing, removing some to inspect it and sealed the destroyed parts with tar; Appendix Vol 3, pg 3168, Gebhardt depo. lines 11 - 14. Pictures of tar, Appendix Vol 3, pg 2101-2102
5. Adding the cantilever closets down spout systems; Appendix Vol 3, pg 3170, Gebhardt depo. lines 9 - 14;
6. Adding extensions to the Northwest and Southwest corner down spouts to discharge out into the yard away from the house; Appendix Vol 3, pg 3198, Gebhardt depo. lines 14 - 22;
7. Doing water hose tests on the brick veneer with Kenneth Smith assisting him to alert him when water began to infiltrate into the basement; Appendix Vol 3, pg 3201, Gebhardt depo. , lines 11 - 19.
8. Inspecting the home with a representative from Baker's Waterproofing; Appendix Vol 3, pg 3215, Gebhardt depo. , lines 1 - 3.
9. Appling silicone caulking to vinyl siding; Appendix Vol 3, pg 3228, Gebhardt depo. lines 15 - 19.
10. Disassembled and reassembled sections of the vinyl siding for inspection;
11. Purchased Dry Lock white paint to cover water stains on basement cement block walls (which Petitioners refused); Appendix Vol 5, pg 9545 photo of Dry Lock.
12. Advised Petitioners to place screen over the away drain for the French drain system to keep out snakes (Respondent Gebhardt denies). Appendix Vol 3, pg 3755, Terri Smith depo. lines 2-8: Ken Smith Affidavit Appendix Vol 2, pg 1522.

The water intrusion continued. Petitioners contacted their present counsel, Ronald Wm. Kasserman, who sent Respondent Gebhardt a certified mail letter dated March 25, 2013, outlining several problems, including the wet basement walls and requesting that they be cured to avoid litigation. Appendix Vol 1, pg 300-302.

On April 9, 2013, Respondent Gebhardt met with Petitioner Terri Smith and Petitioners' counsel to inspect the home and discuss the complaints. Due to Petitioner Terri Smith's concerns about prior misunderstandings with or misrepresentations by Respondent Gebhardt, attorney Kasserman recorded the conversation as permitted by West Virginia Code, § 62-1D-3(e) without

advising Respondent Gebhardt. Respondent Gebhardt agreed to try to resolve some of the complaints about the home. Appendix Vol 6, pg 6854 has a DVD-R of the recording attached. Petitioners filed their Complaint with the Trial Court on September 27, 2013.Appendix 1, pg 129.

The screen over the away drain was not hidden and Respondent Gebhardt's counsel was permitted to informally inspect and take photographs of the premises twice, on December 19, 2013 and February 18, 2014. See Appendix Vol 5, pg 5186-5204 for Respondent Gebhardt's counsel's photographs. The recording of the conversation with Respondent Gebhardt was voluntarily disclosed to Respondents' counsel in discovery.

Jake Lammott of Ground Penetrating Radar Systems, Inc. used a radar scanner that did not alter the walls whatsoever to locate the hollow portions of the walls and marked them with orange painted lines. Photographs of the orange painted lines are in Appendix Vol 6, pg 6616-6622.

Over 123 pictures taken before the orange painted lines were made on the unfinished block walls in the basement showing wetness/staining and covering a period of three (3) years were delivered to Respondent Gebhardt's counsel before his expert causation engineer, Eric Drozdowski, P.E., formally inspected the home on October 19, 2014. See Appendix Vol 6, pg 5993-5998, 6000-6005, 6051-6054, 6065-6068, 6070-6073, 6082-6087, 6089, 6091-6093, 6096, 6097, 6100, 6134-6126, 6139, 6147-6149, 6153-6167, 6170, 6171, 6174, 6175, 6183-6185, 6197-6199.

In November, 2014 Petitioners counsel had an independent bricklayer remove 16 ½ bricks from and approximate 2 feet by 2 feet area of the veneer wall. Appendix Vol 4, pg 4984 photo of bricks stacked in place. Appendix 5, pg 54585 bricks removed photo. The removal shows unequivocally that there was less than a 1 inch air space between the brick veneer wall and the underlying structural interior wall, no flashing between the lower concrete block foundation and first layer of brick and no weep holes, all of which are required by the building standards to create

a dry "envelope" for homes with a brick veneer exterior walls. Appendix Vol 5, pg 5477-5491.

Bricklayer Respondents, Michael Coyne and Triple S&D, Inc. were then added as defendants to the lawsuit by February 17, 2015. Appendix Vol 1, pg 43 & 496.

Respondents, Michael Coyne's and Triple S&D, Inc.'s expert causation engineer, Lorey Caldwell, P.E., formally inspected the home on March 16, 2015, and noted, "All of the sawn control joints in the floor slab were filled with water, and standing water was observed in severeal locations on the basement floor slab." Appendix Vol 5, pg 5271.

Respondent Gebhardt has expressly admitted there has been water intrusion for years.

SUMMARY OF ARGUMENT

The Trial Court's Order awarding the sanction of dismissal was an abuse of discretion as it was based on an erroneous view of the law concerning notice for service of trial subpoenas; an erroneous view of the law regarding the one-party consent rule for legal audio recording of conversations; an erroneous view of the law regarding utilization of the opposing party's expert; an erroneous assessment of the evidence regarding water damage by failing to consider testimony about water intrusion, including but not limited to Respondent Gebhardt's admissions that it existed before any alleged adverse actions by Petitioners; erroneous assessment of the photographic evidence regarding water damage three (3) years before and over three (3) years after any alleged adverse actions by Petitioners; and failing to consider many serious mitigating circumstances specified particularly herein.

Accordingly, the Trial Court's Order dismissing the case should be reversed and the case remanded for trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners, Terri Smith and Kenneth Smith, by counsel, believe that the decisional process

would be significantly aided by oral argument. Petitioners' counsel requests oral argument pursuant to Rule 19(a)(1) as this case involves assignments of error in the application of settled law, pursuant to Rule 19(a)(2) as there was an unsustainable exercise of discretion where the law governing discretion is settled and pursuant to Rule 19(a)(3) as there was insufficient evidence for dismissal or dismissal was against the weight of the evidence.

ARGUMENT

STANDARDS OF REVIEW

> (R)eview in this case is the imposition of sanctions by the lower court, to which we apply an abuse of discretion standard. *See* Bartles v. Hinkle, 196 W.Va. 381, 389, 472 S.E.2d 827,835 (1996) (" 'A primary aspect of ... [a trial court's] discretion is the ability to fashion an *appropriate* sanction for conduct that abuses the judicial process.' Chambers v. NASCO,Inc., 501 U.S. 32, 44-45, 111 S.Ct. 2123, 2132-2133, 115 LED.2d 27,45(1991)." (Bracketed language and emphasis in original.)).

State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139, 146 (2010) .

> Cox v. State, 184 W.Va. 210, 218, n. 3, 460 S.E.2d 25, 33 n.3 (1995) (concurring opinion, Justice Cleckley, stating sanctions are reviewable under an abuse of discretions standard, "but it is clear that a circuit court abuses its discretion if it bases its ruling on an erroneous assessment of the evidence or an erroneous view of the law.").

Murthy v. Karpacs-Brown, 237 W.Va. 490, 788 S.E.2d 18, 25 (2016). See also Bartles v. Hinkle, 196 W.Va. 381, 389, 472 S.E.2d 827, 835 (1996).

> Imposition of sanctions of dismissal and default judgment for serious litigation misconduct pursuant to the inherent powers of the court to regulate its proceedings will be upheld upon review as a proper exercise of discretion when trial court findings adequately demonstrate and establish willfulness, bad faith or fault of the offending party."

Syl. Pt. 7, State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139(2010).

> In formulating the appropriate sanction, a court shall be guided by equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.

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Syl. Pt 2, Bartles v. Hinkle, 196 W.Va. 381, 389, 472 S.E.2d 827 (1996).

> Under the provisions of syllabus point two of *Bartles*, our review actually involves a two-step process of first examining whether the sanctioning court identified the wrongful conduct with clear explanation on the record of why it decided that a sanction was appropriate. 196 W.Va. at 384, 472 S.E.2d at 830. We then must determine whether the sanction actually imposed fits the seriousness of the identified conduct in light of the impact the conduct had in the case and the administration of justice, any mitigating circumstances, and with due consideration given to whether the conduct was an isolated occurrence or a pattern of wrongdoing. *Id.*

State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139, 149 (2010) .

> As was stated in Cattrell Cos. V. Carlton , Inc., 217 W.Va. 1, 14, 614 S.E.2d 1, 14 (2005), "dismissal and default [judgment] are [considered] drastic sanctions that should be imposed only in extreme circumstances." *See also,* Doulamis v. Alpine Lake Prop. Owners Ass'n, Inc., 184 W.Va. 107, 112, 399 S.E.2d 689, 694 (1990) (stating that "dismissal, the harshest sanction, should be used sparingly and only after other sanctions have failed to bring about compliance."); Bell v. Inland Mut. Ins. Co., 175 W.Va. at 172, 332 S.E.2d at 134 (1985) (advising that the sanction of default judgment "should be used sparingly and only in extreme situations [in order to effectuate] the policy of the law favoring the disposition of cases on their merits.").

State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders, 226 W.Va. 103, 697 S.E.2d 139, 149 (2010).

> Of course, dismissing an action is extremely severe. We have suggested that such a harsh sanction would be used as a last resort, and that the party facing the sanction should have had fair warning that such a severe punishment was in the offing:
>
> Further, in almost any conceivable set of circumstances, a circuit court's failure to (1) warn of an impeding ultimate sanction, or (2) consider less serious onerous sanctions before dismissing the case would amount to reversible error. *Hathcock v. Navistar Int'l Transp. Corp.,* 53 F.3rd 36, 40-41 (4th Cir. 1995); See *Cox v. Department of Natural Resources,* Nos. 22484 and 22485, 194 W.Va. 210, 460 S.E 2d 25 (1995) (Cleckley, J., concurring).
>
> Woolwine v. Raleigh Gen. Hosp.,194 W.Va. 22, 228 N.8, 460 S.E. 2d 457, 463 N.8 (1995) (per curiam)

Mills v. Davis, 211 W.Va. 569, 567 S.E.2d 285, 292 (2002).

ASSIGNMENTS OF ERROR

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENT GEBHARDT'S MOTION TO DISMISS AS A SANCTION FOR SERIOUS LITIGATION MISCONDUCT AND SPOLIATION OF EVIDENCE BY PETITIONERS AND PETITIONERS' COUNSEL AND DISMISSING THE CASE AGAINST NOT ONLY RESPONDENT GEBHARDT, BUT ALSO RESPONDENTS

MICHAEL COYNE AND TRIPLE S&D, INC. WHO TOOK NO POSITION ON THE MOTION TO DISMISS

Respondent Gebhardt's Motion to Dismiss alleging witness tampering is based on the Tuesday, November 8, 2016, service upon him of a trial subpoena at his home by a professional process server, John Dan Livingston of J. D.'s Paper Service, issued by Petitioners' counsel requesting that Respondent Gebhardt bring to the first day of trial set for November 14, 2016, "receipts for gravel applied to the basement floor...before the concrete was poured" for the home he built for Petitioners. No notice was given to Respondents' counsel of the service of the trial subpoena.

Besides the Trial Court's rulings on pretrial motions and the Pre-Trial Conference on November 4, 2016, service of the trial subpoena on Respondent Gebhardt was the only thing that had changed in the case for over a year from the October 28, 2015 trial postponement to November 8, 2016. However, that trial subpoena was a springboard for Respondent Gebhardt's second Motion to Dismiss alleging that service of the trial subpoena without notice was litigation misconduct, "harassment and intimidation of a key party-defendant" and stating, "Such **witness tampering** constitutes severe litigation misconduct necessitating the severest of sanctions". (Emphasis added). Appendix Vol 2, pg 1869.

At the evidentiary hearing on the Respondent Gebhardt's Motion to Dismiss, Mark A. Kepple, counsel for the other Defendants/Respondents, Michael Coyne and Triple S&D, Inc. stated, "...I don't have any questions for any of these witnesses and **I don't take any position on the Motion.**" Appendix Vol 2, pg 2322, Transcript 11/15/16, pg. 55, lines 10-11. (Emphasis added).

At the evidentiary hearing on his Motion to Dismiss, Respondent Gebhardt testified:

Q. When Dan Livingston came out to your house, did he do anything to intimidate you?

A. No.

Q. Did he threaten you?

A. No. Appendix Vol 2, pg 2411, Transcript 11/15/16, pg. 134, lines 7- 9.

Q. Did Mr. Livingston tell you how to testify?

A. No.

Q. He didn't say anything was going to be bad that was going to happen to you physically, emotionally or anything else?

A. No.

Q. You don't know - - you have no facts to prove that Dan Livingston was sent there to pump you for information by me; do you?

A. No. Appendix Vol 2, pg 2411-2412, 11/15/2016 pg 134, line 22 to pg 135, line 7.

The Trial Court's Order entered February 3, 2017, granting Respondent Gebhardt's Motion to Dismiss did not make a finding of "witness tapering" or "intimidation". Appendix Vol 1, pg 1-27. However , the Trial Court did make the following findings:

> Plaintiffs' conduct in serving the 11th hour defective subpoena on Gebhardt without prior notice to his counsel was an improper litigation process. It circumvented his right to counsel. Plaintiffs' counsel's decision not to first contact Gebhardt's counsel about the documents being sought was reckless. Plaintiffs; Counsels' intentional conduct resulted in harassment and distraction to Gebhardt on the eve of trial. Plaintiffs caused Gebhardt to waste time and effort chasing 7-year-old gravel receipts. Further, he may have been induced to make statements and admissions to a person who could be called to testify at trial against him, the Court finds that Plaintiffs' conduct in this regard constitutes severe litigation misconduct and is subject to significant sanctions. Appendix 1, pg 26.

In *Keplinger v. Virginia Electric and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2002) this Supreme Court held that:

> When a party to a civil action seeks to utilize W.Va. R. Civ. 45 to subpoena an opposing party's medical records from a nonparty (as opposed to obtaining them by virtue of a release tendered by the party/patient), notice to the party/patient must occur sufficiently in advance of service of the subpoena to provide a reasonable opportunity for the patient /party to object to the request. Syl. Pt. 5, *Keplinger*, supra.

The subpoena to Respondent Gebhardt was not for "discovery." It was for the "trial."

Notice to a party to appear at trial and to bring something with them that they likely had in their possession does not require prior notice to counsel as that affords an opportunity for the subpoenaed party to "duck" or hide from the process server. In this case, the document subpoenaed was a receipt for gravel that was supposed to be utilized in the Smith basement before the concrete was poured. In *Keplinger*, the subpoena was to non-party medical professionals for Ms. Keplinger's medical records, not at trial, but during discovery. It was expressly noted in *Keplinger* :

> Under W. Va. R. Civ. P. 45(b)(1), "prior notice of any commanded production of documents and things or inspection of premises **before trial** *shall* be served on *each party* in the manner prescribed by Rule 5(b)."

Keplinger, 537 S.E.2d at 642. (Original italicized emphasis, boldface emphasis added).

On July 28, 2014, over 2 years before the trail subpoena was served, in response to a Request for Production of Documents for construction files for the Smith home, Respondent Gebhardt indicated that other than the "original plans", i.e. blueprints, there was "**none**" and that "if additional documentation is located, it will be produced."Appendix Vol 2, pg 2098.

Before Respondent Gebhardt's deposition on March 17, 2015, the Second Notice of Deposition Duces Tecum of Robert Todd Gebhardt requested he bring "billings that exist regarding any accounts you utilized to purchase materials for the construction of Plaintiffs' home. . ." Appendix Vol 1, pg 514. Respondent Gebhardt testified at his deposition that those billings were "not with me", that there was "a very strong possibility" that he had them at home and that he "wasn't told to bring them today." Appendix Vol 3, pg 3151, Gebhardt deposition, pg 102, lines 1-9.

Respondent Gebhardt's counsel, P. Joseph Craycraft thereafter stated on the record at the March 17, 2015, deposition:

> If Mr. Gebhardt believes that there's additional documentation that's responsive to that, we haven't objected. We'll produce it. We'll supplement the answers. Appendix Vol 3, pg 3156, Gebhardt deposition, page 107, lines 14-17.

By November, 2016, over a year and a half later, the documents were still not produced.

Serving a trial subpoena on a party for a document that he likely had at home by a professional process server was to obtain evidence of any gravel that should have been placed below the concrete basement floor of the Smith home which was relevant to the litigation as some of the water had been intruding into the basement by coming up through the basement floor at the control joints in the concrete and standing in puddles. Appendix Vol 5, pg 5271.

There was no Motion to Compel this information as previously Mr. Gebhardt had provided his financial ledger and checks regarding everything he purchased relating to the Smith home. However, in final trial preparation it was realized that the actual gravel billing was relevant as the blueprints for the home required 4 inches of gravel beneath the concrete basement floor. Appendix Vol 6, pg 6238.1. Mr. Gebhardt's ledger identified only one purchase of materials before the concrete basement floor was poured, from Contractors Supply in Wheeling for $1,011.24. No subpoena was served on contractors supply, just Respondent Gebhardt.

After the Pretrial conference on Friday, November 4, 2016, Petitioners' counsel worked that weekend and made the decision that Respondent Gebhardt would be among the first of the witnesses to be called in Plaintiff's case-in-chief, possibly the very first, as he had never denied the water intrusion in Petitioners' home.

While personally preparing the subpoena over the weekend, Petitioners' counsel copied a form from a trial he had done in Marshall County, West Virginia and modified it to have the style read Ohio County rather than Marshall County. However, one reference to Marshall County in the form was missed. It is in the "fine print" 9 point type in the subpoena. Appendix 1, pg 1925. Even

so, if the subpoena had been issued by Marshall County it still required appearance "at the Place, date and time specified below to testify in the trial", clearly indicated in larger 13 point boldfaced type **JUDGE SIMS' COURTROOM, 5TH FLOOR, 1500 CHAPLINE STREET, WHEELING, WV** on **November 14, 2016**, at **1:00 P.M.** Appendix 1, pg 1925.

Petitioners' counsel, Ronald Wm. Kasserman, decided to have the subpoena professionally served on Respondent Gebhardt rather than call his lawyers as numerous prior calls and emails had previously gone unanswered and a trial subpoena for one (1) receipt, already in Respondent Gebhardt's possession, which his counsel had already stated on the record would be produced, seemed more likely to procure the evidence at trial. Petitioners' counsel did not contemplate that service of a trial subpoena by a professional process server would be considered "witness tampering" or "harassment" by Respondent Gebhardt or his counsel, let alone the Trial Court.

It appears that counsel for Respondents Michael Coyne and Triple S&D, Inc., Mark A. Kepple, did not perceive that service of the subpoena was intimidating, harassment or witness tampering as Mr. Kepple stated on the record at the evidentiary hearing on November 14, 2017 that he was taking no position on the Motion to Dismiss. Appendix Vol 3, pg 2322, Transcript 11/15/16, pg. 55, lines 10-11.

Previously in the litigation Mr. Kepple for Respondents Michael Coyne and Triple S&D, Inc. had joined in nine (9) of Respondent Gebhardt's filings:

(1) incorporated by reference the parts of Gebhardt's first Motion to Dismiss (on the basis of spoilation) in a Motion in Limine Regarding Spoilation of Evidence, Appendix Vol 1, pg 602;.
(2) Motion in Limine With Regard to Alan Baker, Appendix Vol 1, pg 608;
(3) Motion in Limine With Regard to Martin Maness, Appendix Vol 1, pg 608;
(4) Motion in Limine With Regard to Fred Casale, Appendix Vol 1, pg 612;
(5) Motion in Limine With Regard to Joshua Emery, Appendix Vol 1, pg 616;
(6) Motion in Limine With Regard to John Gongola, Appendix Vol 1, pg 620;
(7) Motion for Summary Judgment on Failure to Mitigate Damages, Appendix Vol 1, pg 624;

(8) Motion for Summary Judgment Regarding Comparative Negligence, Appendix Vol 1, pg 627;
(9) Motion for Summary Judgment on Punitive Damages, Appendix Vol 1, pg 630.

It stands to reason that Mr. Kepple, having previously joined in nine (9) of Respondent Gebhardt's Motions, would have joined in the Motion to Dismiss for witness tampering if he thought it had any factual basis or merit whatsoever.

Respondent Gebhardt's counsel was advised by Mr. Gebhardt of the subpoena and prepared the Motion to Dismiss alleging witness tampering within 2 days of service of the subpoena. Mr. Gebhardt was not deprived of counsel. His counsel did not contact Petitioners' counsel to suggest that the gravel receipt would be supplied or that the subpoena should be voluntarily quashed due to the improper reference to Marshall County. No Motion to Quash the subpoena was filed. Rather the service of the subpoena was used as a springboard to file a Motion to Dismiss as a sanction based on witness tampering and resurrecting all the other prior motions requesting the severe sanction of dismissal, which the Trial Court had previously determined was not an appropriate remedy.

Respondent Gebhardt's first Motion to Dismiss was based on spoliation of evidence related to Petitioners' expert, John Gongola's air samples; Petitioners placing a screen over the away drain of their foundation drainage system; dismantling a portion of the brick veneer wall; and disassembly of a bannister Newel post. Appendix Vol 1, pg 1046.

Trial Court's Order of April 15, 2016, which denied the first Motion to Dismiss, expressly stated, "The Court has concluded that dismissal of this action is not an appropriate remedy for the conduct alleged in this matter." Appendix Vol 1, pg 84.

However, the failure to give notice of the service of the trial subpoena was considered wrongful and led the Trial Court to make a finding of a pattern of such serious misconduct that it imposed the most severe of all sanctions, i.e. dismissal. The Trial Court found:

> Each of these actions in and of themselves would not necessarily give rise to the imposition of sanctions. In fact, to date, the Court has declined to impose sanctions for some of the individual conduct listed above. However, taken as a whole, Plaintiffs' actions demonstrate a pattern of misconduct by Plaintiffs and their counsel that undermines the judicial process, impedes the fair administration of justice, and deprives Defendants of their right to a fair trial in this matter.
>
> At the heart of this case is Plaintiffs' claim that Gebhardt negligently constructed their home thereby causing water intrusion into their foundation and basement. Given this claim, Plaintiffs' actions in: 1) permitting the basement walls to be spray painted orange; 2) intentionally watering the foundation; 3) removing a portion of the brick exterior; and 4) blocking the away drain, are **inexplicable and egregious**. Each of these actions irretrievably taints evidence and contaminates Plaintiffs' claim that Gebhardt's negligence proximately caused the water intrusion and the resulting damages. Their conduct in each of these four (4) areas appears to be a conscious effort by Plaintiffs to unfairly influence the outcome of the litigation in their favor on the issues of both liability and damages. Plaintiffs' actions involve more than mere negligence. Plaintiffs have acted willfully, intentionally, and in bad faith. Appendix Vol 1, pg 19. (Emphasis added).

Those "four (4) areas" shall be addressed in order.

(1) "<u>Permitting the basement walls to be spray painted orange</u>" was the subject of the Trial Court's prior Order dated October 5, 2016, deferring ruling on Respondent Gebhardt's Motion to Strike Plaintiffs' Expert Jake Lammott until an objection was raised at trial. No sanctions were mentioned in that Order. Appendix Vol 1, pg 122 .

However, the Trial Court's February 3, 2017 Order granting the Motion to Dismiss refers to "1) <u>Secretly Destroying and Manipulating Evidence</u>" referring <u>only</u> to the "orange paint test" by Jake Lammott which was done "without notice to Defendants" as partthe analysis for granting the Motion to Dismiss. Appendix Vol 1, pg 8.

Jake Lammott is a project manager for Ground Penetrating Radar Systems, Inc. His anticipated testimony in all three (3) of Petitioners' Expert Disclosures is that " not all the cells of the concrete block were poured solid with concrete, grout or mortar and that areas where there were

visible marks from water coming through the concrete block were consistent with the areas in the blocks where there were voids..." Appendix Vol 1, pg 311, 1057 and Appendix Vol 2, pg 2066.

The reason for Mr. Lammott doing the ground penetrating radar and identifying with orange painted lines where the blocks were not poured solid was to determine whether Mr. Gebhardt was **truthful** when he twice voluntarily announced in a recorded conversation at the home with Petitioner Terri Smith and Petitioners' counsel on April 9, 2013, (before the litigation was filed on September 27, 2013) that the basement walls were "poured solid concrete" in response to questions about a crack in the basement block wall, which was basically straight from the very top to very bottom of the wall, through the middle of every other concrete block on the wall. Appendix Vol 6, pg 6854. Recording minute 21, seconds 18 -21. The recording was to be used for impeachment of Respondent Gebhardt, including at his deposition where he explained that poured solid means "every three to four feet".

> Q. My question was: **Have you ever said that this wall was poured solid concrete?**
>
> Mr. Craycraft: Objection to form.
>
> Asked and answered.
>
> A. I may have, but it didn't go any further than that as far as me specifying -- My idea of poured solid is different than your idea of poured solid. **Poured solid to me means every three to four feet.** (Emphasis added).

Appendix Vol 3, pg 3053-3054, Gebhardt deposition page 12, line 21 to page 13, line 4.

The credibility of all parties is always relevant in civil litigation. The radar scanning instrument used by Mr. Lammott destroyed nothing in the home. Mr. Lammott did put orange painted lines through some of the water stains on the cement block walls in the unfinished area of

the basement to show where the walls were hollow, but pictures of those lines show that the lines did not cover up the extensive water staining on the walls. Appendix Vol 6, pg 6616-6622. Mr. Lammott did not destroy the walls. He simply painted orange lines where the bare concrete block walls were not "poured solid concrete."

Respondent Gebhardt's counsel, P. Joseph Craycraft, Esq. had been permitted to do two (2) informal inspections of the home before the orange spray painted lines were applied on December 19, 2013 and February 18, 2014, and has disclosed his pictures of other areas of the home to be used as trial exhibits. Appendix Vol 5, pg 5186.

Photographs preserving the evidence of the bare concrete walls without orange painted lines were served on counsel for Respondent Gebhardt, Mr. Craycraft, on July 31, 2014, with Plaintiffs' Second Supplemental Disclosure of Documents containing 167 pictures of the home of which 123 pictures were of the bare concrete block walls in the two (2) small unfinished basement rooms, i.e. weight room and storage room, showing wetness and staining as follows:

23 photos prior to July 5, 2012; Appendix Vol 6, pg 5993-5998, 6000-6005
8 photos dated July 5, 2012; Appendix Vol 6, pg 6028-6033
7 photos dated August 28, 2012; Appendix Vol 6, pg 6051-6054
8 photos dated October 30, 2012; Appendix Vol 6, pg 6065-6068
3 photos dated December 11, 2012; Appendix Vol 6, 6070-6071
4 photos dated February 8, 2013; Appendix Vol 6, 6072-6073
20 photos dated April 14,15 & 23, 2013; Appendix Vol 6, pg 6082-6083, 6085-6089, 6091-6093, 6095-6096, 6000
6 photos dated July 12, 2013; Appendix Vol 6, pg 6134-6136, 6139
9 photos dated August 13, 2013; Appendix Vol 6, pg 6153-6154
12 photos dated September 13, 2013; Appendix Vol 6, pg 6155-6161

100 Sub-total pictures before lawsuit filed September 27, 2013

4 photos dated October 14, 2013; Appendix Vol 6, pg 6162-6164
2 photos dated November 12, 2013; Appendix Vol 6, pg 6165
4 photos dated December 5, 2013, Appendix Vol 6, pg 6166-6167
7 photos dated February 9, 2014; Appendix Vol 6, pg 6170-6175, 6183, 6184,6186
6 photos dated March 2, 2014. Appendix Vol 6, pg 6197-6199

123 photos **before orange spray painted lines** 8/13/14 by Jake Lammott

After the litigation was filed Petitioners experienced water intrusion in the home to the extent that they filed a Motion for Expedited Deadline for Rule 34 Land Inspection due to repeated flooding of the basement and the need for mold remediation and cleanup, including discarding of the carpeting from the finished basement recreation room. Appendix Vol 1, pg 186.

Evidence of prior flooding are pictures from 19 months earlier on July 5, 2012. Appendix Vol 6, pg 6030, 6032, 3034, 6039.

Previously photographic evidence and Mr. Craycraft's informal inspections were enough for him and the Trial Court to dispel any concerns about spoliation of evidence in Petitioners' request to discard the moldy basement carpeting. At the hearing on the Petitioners' Motion for Expedited Deadline for Rule 34 Land Inspection Mr. Craycraft advised the Trial Court that he had been to the home informally (Appendix 2/26/14 pg 3, lines 4-6) and stated:

> He's obviously allowed me to go over there, look at it, and I took photographs. He took photographs. They pulled the carpet up. **If he's concerned about a spoliation claim, I think he's cured it,** I mean – um – so if we – if they want to– if you're talking about removing the carpet – now, obviously if you're going to rip down – I don't know that they would rip down drywall, or do something like that, but if it's just they want to take this carpet out and get rid of it, I don't care. Appendix 2/26/14 pg 6, lines 8-18. (Emphasis added).

The Trial Court granted Petitioners permission to get rid of the carpet and padding. Appendix vol 2, pg 2132, Transcript 2/26/14 pg 8, lines 19-22.

In granting the Motion to Dismiss the Trial Court did not consider the mitigating circumstance that photographic preservation and inspection was sufficient to discard the moldy carpet evidence without concern for a claim of spoliation, but then photographic preservation and

inspection was not sufficient to avoid a claim for spoliation relating to the orange painted lines that did not destroy anything. As the Trial Court was not inclined to have a jury view of the home, it failed to consider lesser severe sanctions of excluding the pictures with orange painted lines or excluding the testimony of Jake Lammott. The Trial Court also made an erroneous assessment of the evidence in granting the severe sanction of dismissal as the orange painted lines and a radar scan did not destroy any evidence.

(2) "Intentionally watering the foundation" was the subject of the Trial Court's prior October 12, 2016, Order granting the Respondents Coyne's and Triple S&D's Motion In Limine to Preclude the Presentation of Evidence Relating to the "Water Test", which Order was based on the tests probative value being substantially outweighed in a W.V.R.E. Rule 403 analysis. The Trial Court expressly found that, "This, of course is not a scientific test performed under proper supervision, procedure or controls." The Trial Court excluded the "water tests" from the trial. No sanctions were mentioned. Appendix Vol 1, pg 112.

After the trial subpoena was served on Respondent Gebhardt the "water tests' done by Petitioner Terri Smith became "inexplicable and egregious" to the Trial Court in its Order of February 2, 2017, dismissing the case. Appendix vol 1, pg 19.

Petitioner Terri Smith did the water hose tests on April 14, 15 and 23, 2013, five (5) months before the Complaint was filed September 27, 2013 and expressly stated the dates and amount of time spent on each test in paragraphs 50, 51 and 58 of the Complaint. Notice of testing during the litigation was not an issue as the litigation had not yet been filed at the time of the tests.

The Trial Court's February 3, 2017, Order found, "Both Plaintiffs (Petitioners) testified under oath that this intentional watering resulted in damage to those corners."

That finding is an erroneous assessment of the evidence as the water tests on the 3 days by Petitioner Terri Smith did not permanently change the condition of the water stains on the walls that had developed over the prior 3 years.

Petitioner Terri Smith testified on direct exam by Mr. Craycraft for Respondent Gebhardt at the evidentiary hearing that the water caused the appearance of the corners of the unfinished interior to change. Appendix Vol 2, pg 2308-2309, Transcript 11/14/16 pg 31, line 9 - pg 32, line 9.

On cross-examination by Petitioners counsel Petitioner Terri Smith explained that there was just a temporary change in color, from wet to dry, no permanent damage and "Just the same marks that's always there. Appendix Vol 2, pg 2333-2334, Transcript 11/14/16 pg pg 56, line 22 - pg 57, line 5.

Petitioner Kenneth Smith testified on direct exam by Mr. Craycraft for Respondent Gebhardt at the evidentiary hearing that "We didn't damage anything." Appendix Vol 2, pg 2379, Transcript 11/14/16 pg 102, line 19. On cross-examination by Petitioners counsel Petitioner Kenneth Smith explained that the water stains had been there for at least 3 years and that the testing by Terri Smith did not change them. Appendix Vol 2, pg 2384, Transcript 11/14/16 pg 107, lines 8 - 15.

Petitioner Kenneth Smith further explained that water stains had been on the foundation even before the house was placed on the foundation. Appendix Vol 2, pg 2384-2385, Transcript 11/14/16 pg. 107, line 18 to pg. 108, line 3.

Two (2) photographs preserving the evidence of water stains on the foundation before the house was built on the foundation are from August 6, 2009 and August 7, 2009. Appendix Vol 6, pg 5977, 5978.

It is simply unfair to punish Petitioners for doing water tests 3 times when, before the litigation was filed, they were taught how to do the tests by Respondent Gebhardt, who did the same

water tests to try to find out the source of the water intrusion, which led him to apply water sealant to areas of the west brick veneer wall three (3) times within three (3) years.

Petitioner Kenneth Smith testified on direct exam by Mr. Craycraft for Respondent Gebhardt at the evidentiary hearing as follows:

Q. Did you participate in watering the home on the corners in question? The corners of the - - of the house?

A. With Mr. Gebhardt, I did, yes. Appendix Vol 2, pg 2349 Transcript 11/14/16 pg. 72, lines 21 - 24.

In addition to disclosing the dates and time length of the tests in the Complaint, Petitioners disclosed pictures taken of the tests of the hoses running water on the home and pictures of the basement interior becoming wet from the tests. Appendix Vol 6, pg 6710-6738.

Defendant Gebhardt did not deny doing the water hose tests. Appendix Vol 3, pg 3201, Gebhardt Deposition, page 152, lines 11 to 19.

The finding of the Trial Court in its October 12, 2016, Order granting the Motion in Limine on the "Water Test", that, "This, of course is not a scientific test performed under proper supervision, procedure or controls" is contradicted by a learned treatise on the subject. Respondent Gebhardt's expert liability engineer, Eric R. Drozdowski, P.E., testified regarding the Standard Guide for Evaluating Water Leakage of Building Walls, ASTM (American Society for Testing and Materials) Designation: E 2128-01a "shows general guidelines **for proper water testing procedures**." Appendix Vol 3, pg 2921, Drozdowski deposition, page 127, lines 10 - 13(Emphasis added).

A complete copy of that Standard is attached to Mr. Drozdowski's deposition as Exhibit 16. Appendix vol 3, pg 3003-3037. The ASTM Standard E 2128-01a, at paragraph **X2.MASONRY,** sub-paragraph X.2.8.1, regarding testing states that it may be needed "to determine or verify water

entry locations and water paths" and use of a water hose is expressly identified as a proper test as follows:

> X2.8.2 *Water Spray Testing* - Water penetration locations and water paths can be assessed by water spray tests. **This test can be simply a wall hose test** or a more controlled and reproducible test, such as a modified E514 Laboratory Test for field applications. (Bold face and underline emphasis added.)

Appendix Vol 3, pg 3019.

Respondent Gebhardt did not move to exclude the water tests. Only Respondents Michael Coyne and Triple S& D, Inc. , moved to exclude the water hose tests and did not request sanctions for the water tests at all. Appendix vol 1, pg 597. The Court's prior October 12, 2016 ruling excluding evidence of Terri Smith's water hose testing only excluded her water hose tests and did not exclude Respondent Gebhardt's water tests or mention sanctions. Appendix Vol 1,pg 112.

The Trial Court's February 2, 2017, Order dismissing the case erroneously assessed the evidence as it failed to consider the mitigating factors that Respondent Gebhardt taught Petitioners about the water hose tests; failed to consider that the water hose tests were done on only three (3) days several months before the case was filed; failed to consider that the walls got wet repeatedly due to natural weather conditions for over three (3) years before the case was filed; failed to consider that the water hose tests caused no permanent damage and only temporary staining to already stained walls; failed to consider the tests were voluntarily disclosed in the Complaint; failed to consider that dozens of pictures taken before the water hose tests preserved the water staining on the walls as evidence; and failed to consider the water hose tests as being scientifically reliable.

The service of the trial subpoena was not a qualifying reason to elevate the (erroneous) exclusion of Petitioner Terri Smith's water hose tests to her water hose tests being a reason for the ultimate severe sanction of dismissal of the case.

3) "**Removing a portion of the brick exterior**" was one of the subjects of Respondent Gebhardt's first Motion to Dismiss based on spoliation of evidence. Appendix Vol 1, pg 1050.

The Trial Court's prior Order of April 15, 2016, which denied Respondent Gebhardt's first Motion to Dismiss based on spoliation of evidence and expressly stated, "The Court has concluded that dismissal of this action is not an appropriate remedy for the conduct alleged in this matter." Appendix Vol 1, pg 84.

The appropriate remedy was announced in the Trial Court's Order of October 5, 2016, regarding the Motions in Limine and Motion for Sanctions: Martin Maness which deferred "ruling on whether to give an appropriate adverse inference jury instruction based upon spoliation of evidence." No additional sanctions were mentioned. Appendix Vol1, pg100.

After the trial subpoena was served on Respondent Gebhardt the brick removal became "inexplicable and egregious" to the Trial Court in its Order of February 3, 2017, dismissing the case. Appendix Vol 1, pg 19.

Respondent Gebhardt's liability expert, Eric Drowdowski, P.E., inspected and photographed the Northwest (right front) corner area on October 19, 2104, before the bricks were removed. Appendix vol4, pg 4967, Mr. Drozdowski's photograph No. 147.

Defendant Gebhardt was not prejudiced in any way by the removal of the brick after his liability expert, Mr. Drowdowski, had already inspected and photographed the area.

Respondent Gebhardt's counsel, Mr. Craycraft, had also inspected the home and photographed the area before the brick in a 20 inch by 22 inch area was disassembled (Appendix Vol 44, pg 4194) and after. Appendix Vol 4, pg 5203.

It is admitted that after Respondent Gebhardt's expert Eric Drowdowski inspected Plaintiffs' home on October 19, 2014, Petitioners' counsel, Ronald Wm. Kasserman, did not notify

Respondent Gebhardt's counsel before he had 16 ½ bricks in the area 20 inches high and 22 inches wide at the Northwest (right front) corner of the Smith's home carefully removed by an independent bricklayer, Frank Baker, in November, 2014. The bricks were removed so that the area between the brick veneer and the underlying Tyvek covered interior wall could be examined. Every brick was preserved, though one had been broken, and all of the broken mortar was preserved. Appendix vol 4, pg 4984 and Vol 5, pg 5486.

There was no destruction of the complete brick veneer walls surrounding Plaintiffs' home, just disassembly of the small area of 16 ½ bricks, with one being broken. The remaining 177 lineal feet of the minimum average three (3) feet tall brick veneer wall was not touched. Respondent Gebhardt's counsel, Mr Craycraft, stipulated at the evidentiary hearing that the remaining 177 lineal feet of the brick veneer wall has not been touched. Appendix Vol 2, pg 2417, Transript 11/15/16 evidentiary hearing, pg. 140, lines 8 -12.

As a 20 inch by 22 inch area is just short of 4 square feet which contained 16.5 bricks, then 1 foot square would contain about 4.125 bricks. The remaining 177 lineal feet by average 3 feet high wall contains 531 square feet, which at 4.125 bricks per are foot contains about 2,190 bricks, which were offered to Respondents to remove and inspect. Appendix Vol 2, 2111. Respondents did not accept that offer, likely because the 20 inch by 22 inch disassembled area unequivocally shows no flashing and less than a one (1) inch air space behind the brick veneer.

The International Residential Code for Construction of One and Two Family Dwellings, 2003, (hereinafter "IRC") in effect at the time when the Smiths' home was constructed mandatorily required that behind a brick veneer wall that there be a minium one inch air space (IRC R703.7.4.2), flashing between the concrete block foundation and the first row of brick veneer (IRC R703.7.5) and weep holes every 33 inches immediately above the flashing (IRC R703.7.6). This is to ensure a dry

wall envelope as bricks are porous and any water that gets through them should go into the minimum one inch space, travel downward to the waterproof flashing and then migrate laterally to weep holes that permit the water to escape to the outside.

The removal of the brick revealed that there was no factual issue that flashing between the brick and the underlying cement block foundation wall was omitted. There was no factual issue that there was less than 1 inch air space between the brick veneer and the underlying Tyvek sheathing, and at some places the air space was missing altogether.

Based on the unequivocal evidence that the brick removal revealed, the decision was made to add Respondent, bricklayer Michael Coyne, as a defendant. On February 11, 2015, Respondent Michael Coyne filed his Answer to the Second Amended Complaint with a Cross-Claim against Respondent Gebhardt, who filed a Cross-Claim back. By Agreed Order entered April 27, 2015, all filings referring to Respondent Michael Coyne were "deemed to also refer to Triple S & D, Inc." who was also added as a Defendant. Appendix Vol 1, pg 434.

On March 12, 2015, Plaintiffs voluntarily served all Respondents' counsel with pictures of the Northwest (right front) corner with the bricks removed from the 20 inch by 22 inch area which Respondent Gebhardt identified as a trial exhibit. Appendix Vol 5, pg 5215-5222. Petitioner Terri Smith's notes concerning the brick removal were also voluntarily disclosed, which Respondent Gebhardt identified as a trial exhibit. Appendix Vol 4, 5214.

On March 16, 2015, Respondent Coyne's expert, Lorey Caldwell, P.E. inspected and photographed the premises, including the Northwest (right front) corner with the bricks removed from the 20 inch by 22 inch area. Appendix vol 5, pg 5477-5491.

Respondents' experts, Eric Drowdowski for Respondent Gebhardt and Lorey Caldwell for Respondents Michael Coyne/Triple S& D. Inc., had been provided or taken photographs showing

the area adjacent to the 20 inch by 22 inch area where the bricks were removed and were deposed. Both testified at their depositions that building code standards were violated for no flashing, less than 1 inch air space and no weep holes in the brick veneer walls. Appendix Vol 3, pg 2875, Drozdowski depo, page 81, line 1 to line 23; and Appendix Vol 2, pg 2538, Caldwell depo, page 31, lines 1 - 11.

The Trial Court erroneously assessed the evidence as it failed to consider the mitigating circumstances that no expert witness or fact witness testified as to any adverse effect or prejudice in having the bricks removed from the veneer so that the area behind the veneer could be observed; that Respondent Gebhardt's counsel was permitted to informally inspect before the bricks were removed, that Respondent Gebhardt's expert, Mr. Drozdowski, was permitted to formally inspect and photograph before the bricks were removed; that the brick removal was voluntarily disclosed; that the brick removal unequivocally proved building code violations; and that Petitioners' counsel had the brick removed to make sure that there was evidence to support a valid claim against the bricklayer, Respondent Coyne, before amending the Complaint to add him as a defendant.

The failure to notify counsel did not prejudice anyone as the remaining 177 lineal feet of brick veneer, more than 99%, stands as good evidence today that can still be examined. Available DNA evidence is tested often without prior notice even in serious criminal cases, leading to arrest. As long as there is an adequate sample of DNA remaining for the accused to test, there is no prejudice to overturn a conviction based on the same DNA evidence that led to the arrest.

There was no qualifying reason to elevate the Trial Court's prior appropriate remedy of an potential adverse jury instruction for spoliation of evidence for the dismantling of the brick veneer to the dismantling being a reason for the ultimate sanction, i.e. dismissal of the case.

4) **"Blocking the away drain"** was one of the subjects of Respondent Gebhardt's first Motion to Dismiss based on spoliation of evidence. Appendix Vol 1, pg 10505.

The Trial Court's prior Order of April 15, 2016, denied Respondent Gebhardt's first Motion to Dismiss based on spoliation of evidence and expressly stated, "The Court has concluded that dismissal of this action is not an appropriate remedy for the conduct alleged in this matter." Appendix vol 1, pg 84.

However, after the trial subpoena was served on Respondent Gebhardt the brick removal became "inexplicable and egregious" to the Trial Court in its Order of February 3, 2017, dismissing the case. Appendix Vol 1, pg 19.

Another Trial Court Order of April 15, 2016, had denied Respondent Gebhardt's Motion for Summary Judgment for Failure to Mitigate Damages (appendix Vol 1, pg 1025) for Petitioners failure to install a full interior sub-floor waterproofing system. Appendix Vol 1, pg 64-67. That Trial Court's Order expressly stated, "West Virginia Law requires that a plaintiff should minimize damage and use every reasonable effort to do so." Appendix Vol 1, pg 66. The Trial Court ruled that mitigation was a jury issue and explained, "Plaintiffs are free to reject recommended solutions for the water problems they allege, however they are not free to claim enhanced damages if it is proven that they unreasonably failed to act. Appendix Vol 1, pg 67.

At Respondent Gebhardt's deposition on March 17, 2015, he testified about Petitioners putting a screen over the end of the French drain and that "it's going to back up water into the foundation" and that "it should never be capped off with anything." Appendix Vol. 3, pg3121-3122, Gebhardt deposition, page 71, line 23 to page 72, line 10.

Petitioners were at Respondent Gebhardt's deposition and after learning that there should be no obstruction whatsoever on the pipe, upon advice of their counsel based upon the duty to mitigate damages, they removed the screen. If the screen had been causing any water to infiltrate their home, they mitigated the damage as required by law by removing the screen so that any water flow would

be completely unobstructed. Pictures were taken by Petitioner Terri Smith of Petitioner Kenneth Smith removing the screen and voluntarily served on Respondents' counsel. Appendix Vol 6, pg 6696. The screen was saved and offered for inspection. Nothing was destroyed.

Pictures of the screen over the end of the pipe before removal were taken by Respondent Gebhardt's expert, Eric Drowdowski, on October 19, 2014, (Appendix vol 4, pg 4811-4814) and Respondents Michael Coyne/Triple S& D's expert, Lorey Caldwell, on March 16, 2015. Appendix Vol 5, pg 5289-5300. One of Mr. Drozdowski's pictures actually shows water flowing from the pipe through the screen, proving the pipe was not "blocked." Appendix Vol 4, pg 4812.

The screen was produced in a zip lock bag in open court at the evidentiary hearing on November 15, 2016, and Petitioner Kenneth Smith testified that he took the screen off and put it in the bag, without hosing it off. Appendix Vol 2, pg 2385, Transcript 11/15/16 pg 108, line lines 18-24.

The screen was initially applied to the away drain in the run close to public road shortly after September 24, 2012, when Kenneth Smith cleaned up the mess Respondent Gebhardt made when the French drain system was separated from the gutter/down spout system. Appendix Vol 6, pg 6057-6063. The lawsuit was not filed until a year later on September 27, 2013. Petitioner Terri Smith testified at her deposition that Respondent "Todd" Gebhardt suggested the screen due to her concern about snakes going up the pipe and getting into her house. Appendix Vol 3, pg 3755,Terri Smith deposition, page 18, line 2 to 8. Kenneth Smith signed a sworn Affidavit that states he placed the screen over the "away drain" where the French drain system discharged into a creek at the suggestion of Mr. Gebhardt to take care of Terri Smith's concerns about animals or snakes getting in the system. Appendix vol 2, pg 1522.

As there were no more inspections to be done of the home, Petitioners could have said nothing and kept a secret, but instead voluntarily disclosed the removal of the screen and pictures.

There was no evidence that removing the screen was "inexplicable and egregious" as characterized by the Trial Court in its Order dismissing the case. Appendix Vol 1, pg 19.

The Trial Court made an erroneous assessment of the evidence as it did not consider the mitigating circumstances of Petitioners' attempt to comply with the duty to mitigate their damages; that Petitioners voluntarily provided evidence of the removal and pictures; that both Respondents' experts and counsel inspected and photographed the screen before its removal; and that Respondent Gebhardt's expert's photograph showed that the screen permitted water to flow from the pipe, rather than "blocking" it closed.

There was no qualifying reason to elevate the Trial Court's initial appropriate ruling denying Respondent Gebhardt's first Motion to Dismiss for spoliation of evidence for the removing the screen to the removal being a reason for the ultimate sanction, i.e. dismissal of the case. Though the above four (4) reasons were characterized as "inexplicable and egregious" by the Trial Court, in addition to the previously considered trial subpoena served on Respondent Gebhardt, there were five (5) other items analyzed by the Trial Court, which are addressed in turn.

(5) Performing a Bannister Test without Prior Notice to Defendants was one of the subjects of Respondent Gebhardt's first Motion to Dismiss based on spoliation of evidence. Appendix vol 1, pg 1051.

The Trial Court's prior Order of April 15, 2016, denied Respondent Gebhardt's first Motion to Dismiss based on spoliation of evidence and expressly stated, "The Court has concluded that dismissal of this action is not an appropriate remedy for the conduct alleged in this matter." Appendix Vol 1, pg 84.

The appropriate remedy was addressed in the Trial Court's Order of October 5, 2016, relating to Respondent Gebhardt's Motions in Limine and Motion for Sanctions: Martin Maness which prohibited "any testimony with regard to the 'measurements' performed as described above and will consider an appropriate adverse inference jury instruction based upon spoliation of evidence." No other sanctions were mentioned. Appendix Vol 1, pg 97-99.

However, after the trial subpoena was served on Respondent Gebhardt, the bannister issue became "inexplicable and egregious" to the Trial Court in its Order of February 3, 2017, dismissing the case. Appendix Vol 1, pg 19.

During Respondent Gebhardt's deposition on March 17, 2015, he testified that he had reinforced the bottom post of the bannister (Newel post) with a 5/8ths inch piece of rebar by putting it through the Newel post and into a drilled hole in the concrete floor. Appendix Vol 3, pg 3240-3241, Gebhardt depo. page 192, line 14 to page 193, line 1.

However, Respondent Gebhardt's employee, James M. Dietrich, testified in his deposition the next day, March 18, 2015, that four (4) new long screws were put through the Newel post horizontally into the step to tighten the Newel post and no new hole drilled for use of rebar or pipe. Appendix Vol 3, pg 3046.12, Dietrich Depo. page 26, line 21 to page 27, line 12.

Anxious to prove the inaccuracy of Respondent Gebhardt's deposition testimony and as no testing was to be done, Petitioner's counsel did not notify Respondents' counsel about the non-destructive disassembly of the Newel post. Petitioner Kenneth Smith disassembled the Newel post by removing 6 wood screws, pulled the Newel post off a metal rod protruding out of the existing drilled hole in the concrete floor, pulled the rod out of the hole, the hole filled up with water, measurements were taken of the metal rod showing about 7 inches of wetness, photographs were taken, a dowel rod was inserted into the hole then removed, pictures and measurements taken, the

metal rod was put back in the hole, the Newel post placed back into position on the metal rod, the 6 screws were put back in and tightened. There was no destruction of anything. The Newel post was simply disassembled and reassembled. Measurements were made. There were no destructive tests done.

On March 26, 2015, Petitioners' counsel emailed all Respondents' counsel voluntarily sending pictures and offering to permit their experts to "do a similar limited examination". Appendix Vol 2, pg 2112-2113.

The Trial Court erroneously assessed the evidence as there was no consideration of the mitigating circumstances that all Respondents' experts had already done their inspections; that the disassembly was voluntary disclosed; that the pictures were voluntary disclosed; that Respondents were offered to have their experts do disassembly, measurements and reassembly; and that nothing was destroyed.

There was no qualifying reason to elevate the Trial Court's October 6, 2016, appropriate remedy of excluding "measurements"and a potential adverse inference jury instruction regarding the disassembly of the Newel post to the disassembly being a reason for the ultimate dismissal sanction.

(6) Performing Mold Tests without Notice to Defendants was one of the subjects of Respondent Gebhardt's first Motion to Dismiss based on spoliation of evidence. Appendix Vol 1, pg 1049-1050.

The Trial Court's prior Order of April 15, 2016, denied Respondent Gebhardt's first Motion to Dismiss based on spoliation of evidence and expressly stated, "The Court has concluded that dismissal of this action is not an appropriate remedy for the conduct alleged in this matter." Appendix Vol 1, pg 84.

No sanction was the appropriate remedy as found in the Trial Court's Amended Order of March 9, 2017, regarding the Motions in Limine and Motion for Sanctions: John Gongola, which stated:

> Defendant (Respondent) Gebhardt's expert, Charles Guinther, had no criticism of the testing done by Mr. Gongola regarding the wall cavity tests and air sample tests and confirmed the test results were valid and standard protocols for the samples were followed.
>
> While testing conducted by Plaintiffs without notice to Defendants was improper and potentially prejudicial, the Court cannot conclude that Defendants spoliation claim has merit. Further, **the Court cannot conclude that Defendants were prejudiced** by Plaintiffs' improper conduct. Therefore, Defendants' Motion on this issue is denied. Appendix Vol 1, pg 125. (Emphasis added).
>
> Defendant Gebhardt's Motion for Sanctions is denied. Appendix Vol 1, pg 128.

The air samples did not destroy the millions of cubic centimeters of remaining air in the home. The three (3) wall cavity air sample tests did not destroy the millions of cubic centimeters of air in the walls of the home, only causing three (3) holes in three(3) different walls, each smaller than a dime, which were sealed after the samples were taken. Pictures, laboratory reports and John Gongola's reports were disclosed to Respondents. Respondents were invited to conduct their own testing, but declined.

The Trial Court erroneously assessed the evidence when it changed the ruling that the air sample testing was admissible evidence without any sanctions to the air sample testing being a reason for the ultimate severe sanction, i.e. dismissal of the case.

(7) Filing Untruthful and Inaccurate Expert Disclosures was the subject of several motions by Respondents to exclude expert witnesses and for sanctions. Though the Trial Court limited several experts' testimony, none were excluded. No sanctions were awarded.

In Respondent Gebhardt's zealous defense of the case his counsel moved to exclude Petitioners' experts Josh Emery and Fred Casale from giving opinions on the causation of the water infiltration. Petitioners had filed three (3) Expert Disclosures due to new Scheduling Orders being

entered and all of them disclosed Josh Emery and Fred Casale as experts on cost of repairs, not causation. Appendix Vol 1, pg 316-318, 1063-1064, 2071-2072. Finding that Petitioners were being "untruthful" about Josh Emery and Fred Casale as experts is an erroneous assessment of the evidence as the three (3) Expert Disclosures did not mention them as causation experts in any way.

Regarding Petitioners expert industrial hygienist, John Gongola, the Trial Court permitted his testimony regarding mold testing but excluded Mr. Gongola's testimony regarding "the adverse effects of mold", "construction matters" and "opinions and estimates related to the costs of mold remediation". The Trial Court erroneously assessed the evidence as Mr. Gongola had the requisite qualifications to render expert opinions on those topics. Mr. Gongola is an ACGIH (American Conference of Governmental Industrial Hygienists) industrial hygienist (IH), certified indoor environmentalist (CIE), certified residential mold inspector (CRMI) and certified microbial investigator (CMI). Appendix Vol. 6, pg 6257.

He studied at the Environmental Information Association in Phoenix, Arizona regarding comprehensive instruction on fungal contaminants and hazardous materials remediation and"specialized construction and building science instruction" among other places listed on his Curriculum Vitae. Appendix Vol 2, pg 1660-1675. Mr. Gongola had investigated over 6,000 cases and written over 1500 remediation protocols . Appendix Vol 2, 1660 -1675 and Vol 6,pg 6257.

His report analyses the Smith home and identifies violations of building standards in existence for over 25 years regarding the brick veneer walls. Appendix 6, pg 6276-6278.

> In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Syl. Pt. 5, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

The Trial Court's erroneous exclusion of Mr. Gongola's expert testimony was based on an erroneous assessment of the evidence of his qualifications and is not the proper basis to support the severe sanction of dismissal.

(8) Improperly Recording Defendant Gebhardt

Secret recording of a conversation by someone participating in that conversation is expressly authorized by statute. West Virginia Code, § 62-1D-3(e) states:

> It is lawful under this article for a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing a criminal or tortuous act in violation of the constitution or laws of the United States or constitution or laws of this state. (Emphasis added).

The West Virginia Supreme Court of Appeals explained this section of the statute as follows:

> This one-party consent rule is an exception to the *Act's* general requirement that the interception of wire, oral or electronic communications is only permissible *when authorized by a designated circuit court judge.*
>
> *State v. Burnside*, 233W.Va.273, 757 S.E.2d 803, 805 (2014)(Original emphasis).

The recording of Respondent Gebhardt was under the one-party consent rule in West Virginia Code, § 62-1D-3(e). The recording was made during an open conversation between Respondent Gebhardt, Petitioner Terri Smith and Petitioners' counsel, who Respondent Gebhardt knew represented Petitioners, on April 9, 2013. The litigation was filed September 27, 2013. The recording was preserved as potential cross examination evidence of prior inconsistent statements admissible under WVRE 613. During the open conversation when questioned about a crack in the basement block wall, which was basically straight from the very top to very bottom of the wall, through the middle of every other cement block on the wall, Mr. Gebhardt volunteered twice during

the recorded conversation that the cement block foundation walls were "poured solid concrete." Appendix Vol 6, pg 6854, Recording minute 21, seconds18 - 28.

Though the recording was work product, Petitioner's counsel voluntarily gave Respondent Gebhardt's counsel a CD-R of the recording in June 2014, over eight (8) months in advance of Mr. Gebhardt's deposition on March 17, 2015. Even then at his deposition, Respondent Gebhardt initially denied stating that the walls were poured full of concrete, and then rehabilitated himself stating that "Poured solid to me means every three to four feet." Appendix vol 3, pg 3054, Gebhardt depo. page 12, line 18 to page 13, line 4.

The recording also captures Respondent Gebhardt's representations about noise from water pipes indicating that in 20 years building houses he had "never had this issue before" and that "you'll hear some noise once in a while but you'll never hear that." Appendix Vol 6, pg 6854, Recording minute10, seconds 30 - 50.

This is inconsistent with Respondent Gebhardt's deposition testimony that:

> I didn't think it was that big of a deal. I didn't think it was that loud. It sounded like regular water through the pipes to me."

Appendix Vol 3, pg 3202, Gebhardt depo. page 153, lines 19-21.

The surreptitious recording of a public conversation has been approved as not being unlawful or tortuous pursuant to West Virginia Code, § 62-1D-3(e). See *O'Dell v. Stegall*, 226 W.Va. 590, 623, 703 S.E.2d 561, 594 (2010), footnote 38.

The Trial Court's prior Order of October 12, 2016, regarding Respondent Gebhardt's Omnibus Motion in Limine, paragraph 5, granted the Motion excluding the tape recording, in "the event that the Defendant Gebhardt did not know he was being recorded". No sanctions were mentioned. Appendix Vol 1, pg 105-111.

The Trial Court had an erroneous view of the law in making the recording a factor in awarding any sanction due to the one-party consent rule in the statute.

In the Trial Court's Order granting the Motion to Dismiss it expressly noted that the recording was, "Perhaps the most concerning issue raised..." Appendix Vol 1, pg 23.

The Trial Court went on to find that:

> The Court is totally uncomfortable with the secret recording of Gebhardt. **Just because something is legal, doesn't make it right.** The Court finds that the surreptitious recording of Gebhardt by Plaintiffs and Plaintiffs counsel, while not illegal and not clearly unethical, was dishonorable and undermined the integrity of the judicial system. It was underhanded and prejudicial to the fair administration of justice. The Court finds that Plaintiffs' conduct was deceitful, and that Plaintiffs and Plaintiff's counsel misrepresented themselves to Gebhardt. Appendix Vol 1, pg 23-24 (Emphasis added).

The search for truth is not dishonorable, especially if done legally. No representations were made to Respondent Gebhardt that the conversation was confidential. At the evidentiary hearing Petitioner Terri Smith testified that for three (3) years Respondent Gebhardt had told her things about the construction and problems with her house that were not true as being a reason for wanting a recording. Appendix Vol 2, pg 2345, Transcript 11/15/16 Pg 68, lines 4 - 12.

The meeting at the Petitioners' home was had after Respondent Gebhardt had received a certified mail letter from Petitioner's counsel that expressly advised him:

> This letter is written in hopes of avoiding another legal matter, only this time we would not be working as jurors as you would be the Defendant and I would be the opposing lawyer. However, it is my hope that we will still be able to work together to get matters resolved short of litigation. Appendix Vol 1, pg 158.

The statute is an awesome legal tool to expose misrepresentation by permitting the right to deception via the one-party consent rule expressed in West Virginia Code, § 62-1D-3(e) .

The Trial Court has some experience regarding the statute permitting the recording of conversations having been previously temporarily appointed to the West Virginia Supreme Court of Appeals for the case of *State v. Burnside*, 233 W.Va. 273, 757 S.E.2d 803(2014). The tone of the

Trial Court's lone dissent in *State v. Burnside*, disagreeing with the majority decision granting a writ of prohibition, prohibiting a circuit court from suppressing an audio recording made by a confidential informant, also leads Petitioners' counsel to consider that the recording played a major role in the Trial Court's decision to dismiss Petitioners' case. The dissent in *State v. Burnside* concluded stating: "Beware: you are on notice that someone may be listening." *State v. Burnside*, 757 S.E.2d at 718.

The Trial Court's February 3, 2017 Order dismissing this case noted, "Mr. Gebhardt testified that he 'felt totally violated by that (the recording) when I found out'." Appendix Vol 1, pg 16. However, had Respondent Gebhardt told the truth during the recording, or in his deposition, it is doubtful that his feeling of being violated would have been substantial.

Trial Court's analysis in ordering the severe sanction of dismissal is based upon an erroneous view of the law as the recording is statutorily legal and violates no rule or prior order.

(9) Improperly Communicating With and Retaining Defendant Gebhardt's Rule 26(B)(4) Non-testifying Consultant is addressed in the Trial Court's Order granting the Motion to Dismiss which states, "The Court is equally uncomfortable with Plaintiffs' conduct in communicating with and retaining Mr. Huffner, Gebhardt's Rule 26(b)(4) non-testifying consultant." Appendix Vol 1, pg 24.

"(I)t is clear that a **circuit court necessarily abuses its discretion if it bases its ruling on an erroneous assessment of the evidence or an erroneous view of the law**." *Cox v. State*, 194 W.Va. 120, 218 n. 3, 460 S.E.2d 25, 33 n. 3. (Cleckley, J., concurring)(Emphasis added).

Respondent Gebhardt's consultant construction expert, Phil Huffner, voluntarily and publicly discussed his opinion that the Smith home was a "tear-down" with Petitioners' construction expert, Martin Maness, while they were having lunch together. Appendix Vol 4, pg 4119, Maness depo.

pg. 240 line 9 to page 241, line 19. ("Tear-down" reference at depo pg 240, line 24).

Mr. Maness reported this to Petitioners' counsel, who called Mr. Huffner on August 26, 2014, requesting that Mr. Huffner be an expert for Petitioners. The conversation concluded without Mr. Huffner making a decision as to whether he would be an expert for Petitioners.

The Trial Court had an erroneous view of the law as the use of an adverse party's expert witness is authorized. In fact, the party that had originally used the expert witness bears the burden in disqualifying the use of that expert by the other party.

> In cases where disqualification of an expert witness is sought, the party moving for disqualification bears the burden of proving that at the time the moving party consulted with the expert: (1) it was objectively reasonable for the moving party to have concluded that a confidential relationship existed with the expert; and (2) confidential or privileged information was disclosed to the expert by the moving party. Disqualification is warranted only when the evidence satisfactorily demonstrates the presence of both of these conditions.

Syl. Pt. 3, *State of West Virginia ex rel. Billups v. Clawges*, 218 W.Va. 22, 620 S.E. 2d 162 (2005).

Due to an Amended Scheduling Order setting a new set of deadlines, when Petitioners' served their Plaintiffs' Second Expert Witness Disclosure on March 4, 2015, Mr. Huffner was not listed as an expert as he had not yet communicated as to whether he would agree to serve as Petitioners' Expert. Appendix Vol 2, pg 2066-2074. Had the case proceeded to trial on August 3, 2015, as set in the Amended Scheduling Order (Appendix Vol 1, pg 38), Mr. Huffner would not have been permitted to be Petitioners' expert due to non-disclosure.

But the trial was again postponed and deadlines were changed due to another Scheduling Order. Appendix Vol 1, pg 45. Hoping that he would agree to serve, Petitioners counsel identified Mr. Huffner as an expert witness on Petitioners' Third Expert Witness Disclosure served July 3, 2015. Appendix Vol 1, pg 1074. However, Mr. Huffner never agreed to serve as Petitioners' expert, was never retained or paid anything by Petitioners' counsel and failed to respond to

telephonic and email messages left for him. The Trial Court's finding that Petitioners "retained" Mr. Huffner is an erroneous assessment of the evidence.

Further, on August 24, 2015, during a break in Defendant Gebhardt's expert Eric Drozdowski's deposition, Petitioners' counsel and Respondent Gebhardt's counsel, P. Joseph Craycraft, adjourned to Mr. Craycraft's private office and had a discussion about Mr. Craycraft's objection to Petitioners utilizing Mr. Huffner as an expert witness.

On August 25, 2015, Petitioners' counsel had a telephone conference with Mr. Craycraft and advised him that Petitioners would not be using Mr. Huffner as an expert, but potentially a fact witness or ask the court for missing witness instruction.

Thereafter Petitioners' counsel decided to abandon Mr. Huffner as a witness completely. **Mr. Huffner was not listed as an expert or a fact witness** on Plaintiffs' Pretrial Memorandum served October 13, 2015, (Appendix Vol 2, pg 1688-1689) or Plaintiffs' Second Pretrial Memorandum filed October 27, 2016. Appendix Vol 2, pg 1795-1796. The Trial Court's Scheduling Order had previously ruled that pretrial memoranda contain a "Specific Lost of Witnesses (NO reservations authorized)." and "Therefore **NO** additional evidence developed as a result of deviations from the above will be admitted at the trial." Appendix Vol 1, pg 29 & 32.

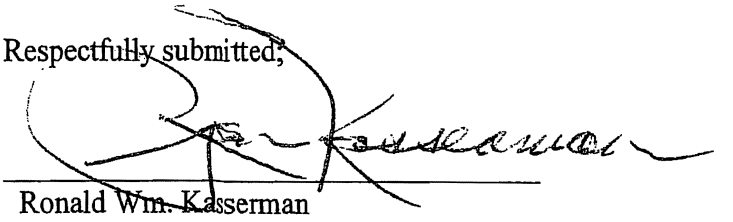
Trial Court's analysis in ordering the severe sanction of dismissal is based upon an erroneous view of the law as the use of an adverse party's expert is legally appropriate and violates no rule or prior order. Trial Court's analysis in ordering the severe sanction of dismissal is based upon an erroneous assessment of the evidence as Mr. Huffner was never retained by Petitioners. Trial Court's analysis in ordering the severe sanction of dismissal ignores that mitigating circumstance that Petitioners abandoned Mr. Huffner as a witness by not listing him as a fact or expert witness in their Plaintiffs' Pretrial Memorandum served October 13, 2015, and filed October 15, 2015, almost

prior order. Trial Court's analysis in ordering the severe sanction of dismissal is based upon an erroneous assessment of the evidence as Mr. Huffner was never retained by Petitioners. Trial Court's analysis in ordering the severe sanction of dismissal ignores that mitigating circumstance that Petitioners abandoned Mr. Huffner as a witness by not listing him as a fact or expert witness in their Plaintiffs' Pretrial Memorandum served October 13, 2015, and filed October 15, 2015, almost a year before the Trial Court's Order of October 12, 2016, ruling that Petitioners could not use Mr. Huffner as an expert witness.

CONCLUSION

As the Trial Court's imposition of the most extreme severe sanction of dismissal is based on erroneous views of the law, erroneous assessments of the evidence and failure to consider substantial mitigating circumstances, Petitioners pray that the Trial Court's Order of February 2, 2017, be reversed and this case be remanded for trial, with directions to permit the expert opinion of John Gongola on the adverse effects of mold, construction matters and estimates related to the costs of mold remediation.

Respectfully submitted,



Ronald Wm. Kasserman

Ronald Wm Kasserman (WVSB #1958)
Kasserman Law Offices, PLLC
94 - 14th Street
Wheeling, WV 26003
Telephone: (304) 218-2100
Fax: (304) 218-2102
ron@kassermanlaw.com

SUPREME COURT OF APPEALS OF WEST VIRGINIA

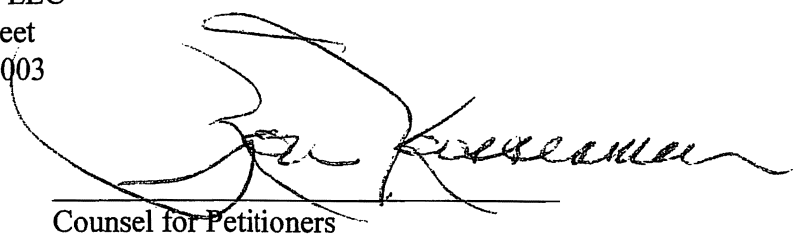
TERRI L. SMITH and KENNETH W. SMITH, Plaintiffs Below, Petitioners,	:	
	:	Case No. 17-0206
v.	:	(Ohio County Civil Action No. 13-C-323)
ROBERT TODD GEBHARDT, MICHAEL COYNE, and TRIPLE S&D, INC., Defendants Below, Respondents.	:	

CERTIFICATE OF SERVICE

Service of the foregoing Petitioners Terri L. Smith's and Kenneth W. Smith's Appeal Brief and Appendix, was had upon the parties herein, by hand delivering true and correct copies thereof, on June 22, 2017, as follows:

P. Joseph Craycraft, Esquire
Katherine Dean, Esquire
Swartz Campbell, LLC
1233 Main Street, Suite 1000
Wheeling, WV 26003

Mark A. Kepple, Esquire
Bailey & Wyant, PLLC
1219 Chapline Street
Wheeling, WV 26003



Counsel for Petitioners

Ronald Wm Kasserman (WVSB #1958)
Kasserman Law Offices, PLLC
94 - 14th Street
Wheeling, WV 26003
Telephone: (304) 218-2100
Fax: (304)218-2102